STATUTORY CHANGES IN EMPLOYERS' LIABILITY.

NO legal principle, with a growth of less than half a century, has become more firmly fixed in the common law of to-day, than the rule that an employer, if himself without fault, is not liable to an employee injured through the negligence of a fellow-employee engaged in the same general employment. This exception to the well-known doctrine of *respondeat superior*, although sometimes considered an old one,[1] was before the courts for the first time in 1837, in the celebrated case of Priestly *v.* Fowler, 3 M. & W. 1, which, it is said, has changed the current of decisions more radically than any other reported case. Thirteen years later the above rule was again laid down in the case of Hutchinson *v.* The York, New Castle, and Berwick Railway Company, 5 Ex. 343, which definitely settled the law of England. The Scotch judges at first repudiated the new doctrine,[2] but they were quickly overruled by the House of Lords on appeal in the two cases of the Bartonshill Coal Company *v.* Reid, and the Bartonshill Coal Company *v.* McGuire, reported in 3 McQueen, 266 and 300. The Irish courts have uniformly followed Priestly *v.* Fowler,[3] and no recourse to the House of Lords has been found necessary to bring them into line.

The American law, though in harmony with the English, seems to have had an origin of its own. In 1841, Murray *v.* The South Carolina Railroad Company, 1 McM. 385, decided that a railroad company was not liable to one servant injured through the negligence of another servant in the same employ. Although this decision came a few years after Priestly *v.* Fowler, the latter case was cited by neither counsel nor court. It is probable, therefore, that the American court arrived at its conclusion entirely independent of the earlier English case, — a fact often lost sight of by

[1] Willes, J., in Gallagher *v.* Piper, 16 C. B. N. S. 677, and Pollock, C. B. in Vose *v.* Lancashire and Yorkshire R. Co., 2 H. & N. 728.

[2] Sword *v.* Cameron, 1 Scotch Sess. Cas. 493 (1839); Dixon *v.* Rankin, 14 Scotch Sess. Cas. 420 (1852).

[3] The first case was McEnery *v.* Waterford and Kilkenny R. Co., 8 Ir. C. L. R. 312 (1858).

those who, in criticising the rule, assert that it all sprang from an ill-considered opinion by Lord Abinger in Priestly *v.* Fowler. The leading American case, however, is Farwell *v.* Boston and Worcester Railroad Company, 4 Met. 49, which, following the South Carolina case, settled the rule in the United States. It has been followed in nearly every jurisdiction, both State and Federal.

To escape liability under the rule, hower, the employer must be without negligence himself. He must select workmen and machinery reasonably suitable for the work in hand, and in case of injury he must show that he was unaware of the incompetence of the men or the defect in the machinery, and that he exercised reasonable care in making his selections. It should be noticed, too, that the employer is not exempt from liability unless the person causing and the person suffering the injury are "fellow-servants" engaged in the "same common employment." Without attempting to go into a discussion of the much-mooted meaning of these two phrases,[1] it will be sufficient for the purposes of this paper to say that the tendency of the American courts, especially since the case of Chicago, Milwaukee, and St. Paul Railway Company *v.* Ross, 112 U. S. 377, has been to interpret them favorably to the employees; while the English courts, together with those of Maine, Massachusetts, New York, Pennsylvania, and a few other States, have extended the terms to include a great variety of cases, thereby increasing largely the immunity of the employers.

This doctrine of common employment, as the above rule is generally called, has been bitterly opposed. It rests, at best, upon grounds of public policy of thirty or forty years ago,—grounds which to-day have perhaps ceased to exist. Be that as it may, the fact remains that frequent attempts have been made to alter the law by legislation. It should be noticed, however, that general statutes afford no relief. Unless provision for remedy in cases of negligence of fellow-servants is expressly made, the courts apply rigorously the common-law rule excusing the master from liability. For instance, in Missouri it is held that a statute giving a right of action against a railroad company "whenever any person shall die from any injury resulting from, or occasioned by, the negligence, unskilfulness, or criminal intent

[1] See Shearman and Redfield on Negligence, vol. 1, chap. x. (1888).

of any officer, agent, servant, or employee," does not alter the common-law rule in this respect.[1] In Maine, the common law in its application to railroad corporations was not changed by R. S., chap. 81, § 21, providing that "every railroad corporation shall be liable for all damages sustained by any person in consequence of any neglect of the provisions of the foregoing section, or of any other neglect of any of their servants, or by any mismanagement of their engineer, in an action on the case by the person sustaining such damages." The court held that "statutes, unless plainly to be otherwise construed, should receive a construction not in derogation of the common law." Consequently the words "any person" are limited to such persons as are not servants of the corporation.[2] In Randall *v.* Baltimore and Ohio Railroad Company, 109 U. S. 478, the Supreme Court held that a statute providing that "the corporation owning the railroad shall be liable to any person injured for all damages sustained" by neglect to ring the locomotive bell, did not make the corporation liable for an injury to a brakeman caused by the negligence of a fellow-servant, a fireman.

Statutes have been passed, however, with the special purpose of modifying or abolishing the doctrine of common employment. In Georgia, Iowa, Kansas, Wisconsin, Montana, and Wyoming the legislatures have guarded the employees of railroad corporations from the common-law rule of non-liability. In England, Alabama, and Massachusetts the statutory changes have been more extensive, and are confined to no special class of workmen.[3]

The first legislature in this country to attack the growing power of the doctrine of common employment was that of Georgia. Prior to 1856 there was no right of action in the State by an employee when the injury was caused by the negligence of a co-employee. In that year a statute[4] was passed providing that

[1] Proctor *v.* Hannibal and St. J. R. Co., 64 Mo. 112. Cf. 9 Heisk. 276.

[2] Carle *v.* Bangor and Piscataquis C. & R. Co., 43 Me. 269.

[3] Employers' liability is slightly increased by the Illinois Miners Acts of 1872 and 1877, and the Kentucky Statute (2 Stanton's Rev. Stat. Ky. 510, § 3) as to killing through wilful neglect; but more than a passing notice of them is unnecessary. The same is true of the English Factory Acts of 7 Vict., c. 15, § 21, and the English Coal-Mines Regulation Act of 35 and 36 Vict., c. 76, § 26. The California Statute (Codes and Stats. Cal. 6971, § 1971, and 6970, § 1970), copied by Dakota (Revised Code, 1877, p. 396), makes no material change in the common law.

[4] Acts of 1855–56, p. 155.

employees of railroads could recover, if without negligence themselves, when the injury was caused by the act of a co-employee. This statute was incorporated into the successive codes. The provisions of the present code relating to employers' liability are the following :[1] —

§ 2083. "Railroad companies are common carriers and liable as such. As such companies necessarily have many employees who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employees as to passengers for injuries arising from the want of such care and diligence."

§ 3036. "If the person injured is himself an employee of the [railroad] company, and the damage was caused by another employee and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

This exception to the common-law doctrine, however, is confined strictly to railroads, as § 2202 enacts that "the principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business. The exception in the case of railroads has been previously stated."

How far these different sections modified one another, it became necessary for the courts to decide. In Thompson *v.* Central Railroad and Banking Company, 54 Ga. 509, the plaintiff, a switchman, was injured by the dropping of a bar of iron on his shoulder by the carelessness of some laborers engaged in carrying the iron across the defendant's yard. The court below granted a nonsuit, on the ground that the road was not liable to an employee for injuries received from co-employees, unless connected with the running of trains. To this ruling the plaintiff excepted, and the question before the court was, whether in a case not connected with the running of trains the road was liable. In a previous case,[2] the court thought there might be doubt "whether the section embraces any injuries but such as are sustained from the running of the cars or engine." The court here, however, held the company liable, reversing the judgment. This construction has been repeatedly followed and recognized. In Georgia Railroad and Banking Company *v.* Goldwire, 56 Ga. 196, the court said that these provisions "declare in unmistakable

[1] Code Ga., 1873.

[2] Henderson *v.* Walker, 55 Ga. 481. This case was decided before, though reported after, Thompson's case. *Vide* Georgia Railroad *v.* Ivey, 73 Ga., 499, 503.

terms that any employee who is free from fault can recover for the negligence of any other employee without respect to whether the two were engaged about the same business or not. This is the invariable rule that holds between railroad companies and their employees, under our code." In the latest case, Georgia Railroad *v.* Ivey, 73 Ga. 499, the statute was held to apply to an employee of the company killed by the carelessness of other employees, all engaged in the erection of a bridge.

In no case, however, can the employee recover unless without fault in himself. In Campbell *v.* Atlanta and Richmond Air Line Railroad Company, 53 Ga. 488, it was held that the burden was on the plaintiff to show that the injury was caused without fault or negligence on his part. A year later, in Thompson's case, to which reference has already been made, it was held that it was for the company to show the injured employee either at fault or negligent. The court adds, in a note[1] to its opinion, that, in deciding the case before it, consideration of the case in 53 Ga. 488, was inadvertently omitted. It was shown, however, in Central Railroad and Banking Company *v.* Kelly, 58 Ga. 107, 113, that these two cases might be reconciled by applying this test, — that if the plaintiff is wholly disconnected with duties about the particular business in which he was hurt, the presumption of law that he is without fault arises ; but if he was engaged in the duty in the discharge of which he was hurt, the burden is on him to show that he was without fault. In Savannah, Florida, and Western Railway *v.* Barber, 71 Ga. 644, it is pointed out that a charge to the effect that the burden is on the plaintiff to show not only himself blameless, but the defendant negligent, is erroneous. " The moment the plaintiff proves to the jury either, the legal presumption proves the other until rebutted, and the defendant must rebut that presumption."

The next State to alter the law was Iowa. Down to 1862 the common-law rule prevailed.[2] In that year the Legislature passed an act, chap. 169, of which the seventh section provided that " every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents or by any mismanagement of the engineer or other employees of the corporation, to any person sus-

[1] P. 513. [2] Sullivan *v.* The M. & M. R. R. Co., 11 Ia. 421.

taining such damage." Objection was at once made to the act as unconstitutional; but the objection was overruled by the court in McAunich *v.* Mississippi and Missouri Railroad Company, 20 Ia. 338.[1]

Under this statute the court has held, in Hunt *v.* Chicago and North Western Railroad Company, 26 Ia. 363, that the liability of the company was measured by a different standard of negligence from that applied in cases of injury to passengers. While extraordinary care and caution are required with respect to passengers, only ordinary care is due to the employee. Wright, J., dissented on the ground that the same rule should be applied to both passenger and employee.

The original law of 1862, twice amended (by ch. 121, 13 G. A., and ch. 65, 14 G. A.), was incorporated into the Code of 1880, vol. i., § 1307, where it now stands in the following form: —

"Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

This statute has given rise to much litigation. The clause limiting the liability of the company to employees engaged in operating a railway has been strictly construed. It has been held, for instance, that an employee whose duties consisted in operating the turn-tables, opening the doors of the engine-house, and shovelling off the snow, was not within the statute as operating a railway. Hence to him the common-law rule applied, preventing a recovery for an injury suffered through the negligence of a fellow-servant.[2]

The same is true of a mechanic in a machine-shop of the company;[3] of one whose duty it was to repair cars standing on a side-track, and occasionally to ride on the road to make such repairs;[4]

[1] See also Deppe *v.* The Chicago, R. I., & P. R.R. Co., 36, Ia. 52, and Bucklew *v.* The Central Iowa Ry. Co., 64 Ia. 603.

[2] Malone *v.* B., C. R., & N. R. Co., 65 Ia. 417.

[3] Potter *v.* C., R. I., & P. R. Co., 46 Ia. 399.

[4] Foley *v.* C., R. I. & P. R. Co., 64 Ia. 644.

of track repairers;[1] of employees engaged in hoisting coal into a coal-house,[2] or loading a car;[3] of one who kept the appliances in a round-house in proper condition.[4] The statute does apply, however, and give relief to one engaged in working on a bridge and occasionally required to ride on the train in the course of his employment;[5] to a section hand;[6] to one engaged in shovelling gravel from a gravel train;[7] to one operating a dirt train;[8] to a detective walking on the track looking for obstructions;[9] and to foreman of gang of workmen employed in the construction and repair of bridges on the road.[10]

Whether or not the character of the plaintiff's employment brings him within the provision of the code is a question of fact for the jury.[11]

A receiver comes within the meaning of the statute as a person managing a railway. Although he is not liable personally, a judgment against him could be satisfied out of the funds in his hands.[12]

It should be borne in mind that in all these cases coming up under the statute, if the employee is guilty of contributory negligence he has no remedy. The burden is on the plaintiff to show that he was in the exercise of due care.[13] It may be inferred, however, from the circumstances of the case, without direct proof.[14]

In Kansas the first attempt to modify the law was made in 1874, by the passage of chap. 93, § 1, of the acts of that year. This act was subsequently incorporated into the Civil Code, now reading as follows:—

"Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence

[1] Matson *v.* C., R. I., & P. R. Co., 68 Ia. 22.
[2] Luce *v.* C., St. P., M. & O. R. Co., 67 Ia. 75.
[3] Smith *v.* B., C. R., & N. R. Co., 59 Ia. 73.
[4] Manning *v.* B., C. R., & N. R. Co., 64 Ia. 240.
[5] Schroeder *v.* C., R. I., & P. R. Co., 47 Ia. 375.
[6] Fraudsen *v.* C., R. I., & P. R. Co., 36 Ia. 372.
[7] McKnight *v.* I. & M. R. C. Co., 43 Ia. 406.
[8] Deppe *v.* C., R. I., & P. R. Co., 36 Ia. 52.
[9] Pyne *v.* C., B., & Q. R. Co., 54 Ia. 223.
[10] Houser *v.* C., R. I., & P. R. Co., 60 Ia. 230.
[11] Schroeder *v.* C., R. I., & P. R. Co., 41 Ia. 344.
[12] Sloan *v.* C. I. R. Co., 62 Ia. 728.
[13] Rusch *v.* City of Davenport, 6 Ia. 443, 452; Baird *v.* Morford, 29 Ia. 531.
[14] Nelson *v.* C., R. I. & P. R. Co., 38 Ia. 564.

of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage." [1]

This provision, it will be seen, was copied almost verbatim from the Iowa Act of 1862; like its predecessor, it was at once assailed as unconstitutional, but with the same ill success.[2] Not only is the act constitutional, but a contract in contravention of it has been held void.[3]

The statute gives to employees the same rights as those enjoyed by strangers. It gives the former, however, no greater rights. It does not "make the corporation responsible to them for the acts and conduct of agents and employees outside the scope of their duties, or chargeable with the knowledge of a notice to employees in such matters." [4]

In Atchison, Topeka, & Santa Fé Railway Company *v.* Koehler, 37 Kas. 463, it was held that a man employed to work about the track and in the yard of the railroad company, injured by the negligence of a fellow-servant, came within the provisions of the act. The case of Union Pacific Railway Company *v.* Harris, 33 Kas. 416, is cited as authority for the decision. In that case a section-man who, with others, was engaged in unloading from a car rails to be used in the repair of the track, was injured by the carelessness of his co-employees, whereby a rail was thrown on his foot. He was held to be within the protection of the statute.

Wisconsin presents the curious example of a State which has attempted to change the doctrine of common employment by statutory provisions, and then abandoned the attempt and gone back to the old doctrine. Up to 1875 the common-law rule of employers' liability held sway.[5] In that year a statute [6] was passed making railroad companies liable for injuries to servants. The law, § 1816 R. S., 1878, is as follows:—

"Every railroad corporation shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or ser-

[1] Compiled Laws of Kansas, 1885, § 5204.

[2] Missouri Pacific R. Co. *v.* Haley, 25 Kas. 35.

[3] Kansas Pacific R. Co. *v.* Peavey, 29 Kas. 169.

[4] Solomon R. Co. *v.* Jones, 30 Kas. 601, 609.

[5] Chamberlain *v.* M. & M. R. Co., 7 Wis. 425; Anderson *v.* M. & St. P. Ry. Co., 37 Wis. 321.

[6] Laws of 1875, chap. 173.

vant thereof without contributory negligence on his part, when sustained within this State, or when such agent or servant is a resident of, and his contract of employment was made in, this State, and no contract, rule, or regulation between any such corporation, or any agent or servant, shall impair or diminish such liability."

This section of the Revised Statutes was repealed in 1880,[1] and to-day the common-law rule has no restrictions placed on it by legislation.[2] The only case which ever reached the Supreme Court was Gumz, admx., *v.* Chicago, St. Paul, and Minneapolis Railway Company, 52 Wis. 672, decided in 1881, in which a nonsuit ordered by the court below was sustained on the ground that there was no negligence on the part of the agent or servant of the company causing the injury.

The statutes in the two Territories, Wyoming and Montana, have never been before the courts. They read as follows: —

Compiled Laws of Wyoming (1876), 512, chap. 97 (approved 1869): "Any person in the employment of any railroad company in this territory who may be killed by any locomotive, car, or other rolling stock, whether in the performance of his duty or otherwise, his widow or heirs may have the same right of action for damages against such company as if said person so killed were not in the employ of said company; any agreement he may have made, whether verbal or written, to hold such company harmless or free from an action for damages in the event of such killing shall be null and void, and shall not be admitted as testimony in behalf of said company in any action for damages which may be brought against them; and any person in the employ of said company who may be injured by any locomotive, car, or other rolling stock of said company, or by other property of said company, shall have his action for damages against said company the same as if he were not in the employ of said company, and no agreement to the contrary shall be admitted as testimony in behalf of said company."

Laws of Revised Statutes of Montana (1879), 471, § 318: —

"That in every case the liability of the [railroad] corporation to a servant or employee acting under the orders of his superior shall be the same, in case of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him, as if such servant or employee were a passenger."

Such is the history of employers' liability legislation down to 1880. Four States and two Territories have passed statutes practically abolishing the doctrine of common employment, but only in the single case of railroad employees. In Iowa the exemption is restricted closely to those employees actually engaged in the hazardous business of railroading. In Georgia and Kansas a

[1] Laws of 1880, chap. 232.

[2] Heine *v.* C. & N. W. Ry. Co., 58 Wis. 525; Peace *v.* C. & N. W. Ry. Co., 61 Wis. 163.

broader rule prevails. In Wyoming the exceptions are limited to injuries occasioned by the rolling-stock, — a phrase which in time will be frequently before the courts for definition. In Montana the employee and the passenger are treated, in many respects, with the same consideration. In three of these jurisdictions — Iowa, Wisconsin, and Wyoming — any attempt to contravene the statute by contract or otherwise is expressly prohibited. In one — Kansas — such an attempt, although not expressly prohibited, is not sustained by the courts. Of these six jurisdictions, one only has repealed the statutory provisions. In the other five they remain in full force and operation. Whenever contracts in contravention of the statute, however, are allowed, the will of the Legislature is easily thwarted.

The next step in the history of legislation on this subject is an important one. The harshness of the rule of non-liability of employers, increased rather than diminished by the constant flow of decisions, led to an extensive agitation of the question in England, in which the workingmen's associations took a prominent part. In 1877 the attention of Parliament was called to the subject, but it was not till 1880 that "The Employers' Liability Act"[1] was finally passed. The provisions of this act are as follows : —

"Where, after the commencement of this act, personal injury is caused to a workman —

(1.) By reason of any defect in the condition of the ways, works, machinery, or plant, connected with or used in the business of the employer; or

(2.) By reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence; or

(3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed; or

(4.) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

(5.) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, —

the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the

[1] 43 and 44 Vict., c. 42.

same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work."

To recover, however, it must appear that the defect in (1) arose from the negligence of the employer, or of some one intrusted by him with the duty of keeping the works in proper condition. If the workman knew of the defect, and failed to give notice within a reasonable time, his remedy is barred. The sum receivable as compensation is limited to the amount of estimated earnings, during three years preceding the injury, of a person in the same grade as the injured employee. Notice of injury must be given within one week, and action begun within six months, of the occurrence of the accident, or, in case of death, within twelve months.

Any penalty paid under act of Parliament to a workman shall be deducted from the compensation which that workman may receive for the same cause of action under the provisions of this act. "A person who has superintendence intrusted to him" is defined as "a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labor." The expression "workman" means a railway servant, and any person to whom the Employers and Workmen Act of 1875 applies, *i.e.*, laborers, servants in husbandry, journeymen, artificers, handicraftsmen, mechanics, miners, and in general any one engaged in manual labor.[1]

In theory the act was far-reaching in its purport. In practice it has fallen far short of accomplishing the results expected of it. This is largely due to the omission of any provision prohibiting contracts in contravention of the act. Taking advantage of this fact, many railway and mining companies, private corporations, and individuals, with more or less persuasion compelled their employees to sign contracts of hire releasing them from liability for damage under the act. The question of the validity of such contracts came up in the case of Griffiths *v.* Earl of Dudley, 9 Q. B. D. 357, which held, not only that an employee may contract himself out of the protection of the act, but that such a contract will bar the right of his widow to sue in case the injury results in

[1] This does not include an omnibus conductor (Morgan *v.* London General Omnibus Company, 13 Q. B. D. 832), nor the driver of a tram-car (Cook *v.* North Metropolitan Tramways Company, 18 Q. B. D. 683).

his death. The effect of the decision is, that the employee can bargain away the rights of his family, secured by Lord Campbell's Act, as well as his own right to recover damages. Under the influence of this case, it is now, it is authoritatively stated, a very common practice for employees to sign such contracts. So, at the outset, a large class of operatives and laborers have to be omitted in considering the practical results of the act. Add to this the fact, shown by carefully compiled statistics, that in eighty-nine per cent. of all the cases decided under the act, the plaintiff has failed to maintain his action because of contributory negligence, and it will be seen that the number of employees actually benefited by the act is small. Moreover, the act does not abolish the defence of common employment. It is still a good defence in certain cases. If the person causing, and the person suffering, the injury are fellow-servants of the same grade, the liability of the master remains unchanged. The act does do away, however, with much of the law that has grown up since Priestly *v.* Fowler, the very law which has been most complained of by workmen.

As would be expected, actions on the Employer's Liability Act have been frequent, and the number of cases which have reached the higher courts is numerous.

Under sub-section one, relating to "defect in the condition of the ways, works, machinery, or plant," it has been held that a vicious horse is a defective "plant;"[1] that "works" must be taken to mean works already completed, and not works in course of construction, which are on completion to be connected with the business of the employer;[2] that "defect in the condition of machinery" includes unsuitable machinery, and is not confined to cases where the machinery has become defective;[3] that the same clause covers a case where the machine, though not defective in its construction, was, under the circumstances in which it was used, calculated to cause injury to those using it;[4] that obstacles lying in the way which do not in any degree alter the fitness for the purpose for which it is generally used, and cannot be said to be incorporated with it, do not make it defective within the meaning of the section.[5] A "defect in the condition of the way" was not shown by the following facts: There were two wells

[1] Yarmouth *v.* France, 19 Q. B. D. 647. [2] Howe *v.* Finch, 17 Q. B. D. 187.
[3] Cripps *v.* Judge, 13 Q. B. D. 583. [4] Heske *v.* Samuelson, 12 Q. B. D. 30.
[5] McGiffin *v.* Palmer's Shipbuilding and Iron Company, 10 Q. B. D. 1.

in a house, one intended for an elevator and the other for a stairway; rubbish was frequently thrown down the first; in the second the men placed their ladders to reach the upper stories; in time this well was filled in with the stairs, and the ladders were transferred to the other well; while ascending, a workman was injured by the throwing of rubbish down upon him.[1]

Under sub-section two it has been held that the employer is liable, though the superintendent, when negligent, is voluntarily assisting in manual labor.[2] The superintendent need not, of necessity, have actual superintendence over the workman injured.[3] In another case, the plaintiff and one X. were engaged with others in loading sacks of corn into the hold of a vessel. X.'s duty was to guide with a guy-rope the beam of the crane used in lowering the sacks, and to give direction when to lower and hoist the chain. By his negligence in not using the guy-rope, the sacks fell down the hatchway and injured the plaintiff; but it was held that X. was "engaged in manual labor" and was not "a person having superintendence intrusted to him."[4] A somewhat similar case was Kellard *v.* Rooke, 19 Q. B. D. 585. The plaintiff, with other workmen, was stowing bales of wool in the hold of a ship. The men were divided into gangs, with a foreman for each gang. The bales were drawn to the hatchway, and then dropped down to the workmen below. The foreman of the plaintiff's gang worked on deck and signalled the men below before a bale was dropped. By his failure to give the customary signal the plaintiff was injured by the falling of a bale. It was held that the injury was not caused by the negligence of a person who had "any superintendence intrusted to him, whilst in the exercise of such superintendence," or by reason of the "negligence of any person in the service of the defendant, to whose orders or direction the plaintiff was bound to conform," *i.e.*, the foreman did not come within the provisions of either sub-section two or three.

Under sub-section five there have been numerous cases before the courts. "Railway" is not confined to railways operated by railway companies, but includes a temporary railway laid down by a contractor for the purposes of the construction of works.[5] A

[1] Pegram *v.* Dixon, 55 L. J. Q. B. 447.
[2] Osborne *v.* Jackson, 11 Q. B. D. 619. [3] Ray *v.* Willis, 51 J. P. 519.
[4] Shaffers *v.* General Steam Navigation Company, 10 Q. B. D. 356.
[5] Doughty *v.* Firbank, 10 Q. B. D. 358.

steam crane fixed on a trolly and propelled by steam along a set of rails, when it is desired to move it, is not a locomotive engine.[1] H., employed as a "capstan-man" by a railway company, propelled a series of trucks along a line of rails without giving the usual warning. Consequently, the plaintiff, employed in similar work a hundred yards off, was injured. The capstan was set in motion by hydraulic power communicated to it by H. from a stationary engine. It was held, under these facts, that H. was a person who had the control of "a train upon a railway."[2] A person employed in the signal department of a railway, whose duty is to clean, oil, and adjust the points and wires of the locking apparatus along the line, under the orders of the inspector of that department who is responsible for the same, is not a person having "charge or control" of the points.[3]

Alabama was the first of the American States to follow the example of Great Britain in passing an Employers' Liability Act. On February 12, 1885, the Legislature passed an act entitled "An Act to define the liabilities of employers of workmen for injuries received by the workman while in the service of the employer." This act was elaborated somewhat for the new Code of 1887, where it now stands, as follows :[4] —

"When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employee, as if he were a stranger, and not engaged in such service or employment, in the cases following: —

1. When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer.

2. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer who has any superintendence intrusted to him, whilst in the exercise of such superintendence.

3. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employee, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed.

4. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or

[1] Murphy *v.* Wilson, 48 L. T. 788.
[2] Cox *v.* Great Western Railway Company, 9 Q. B. D. 106.
[3] Gibbs *v.* Great Western Railway Company, 12 Q. B. D. 208.
[4] Civil Code, 1887, 1, § 2590.

made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf.

5. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track of a railway.

"But the master or employer is not liable under this section, if the servant or employee knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that the master or employer or such superior already knew of such defect or negligence; nor is the master or employer liable under subdivision one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition."

Then follow two brief sections (§§ 2591, 2592) allowing the personal representative to sue if injury results in death, and exempting damages recovered by the servant from payment of debts or other legal liabilities.

This statute, as was pointed out by the court in the first case coming up under it, "is a substantial copy of the English act." It gives the employee a right of action in certain cases as if he was one of the public, taking away from the employer the defence of common employment; but "when the employee who is injured and the employee whose negligence caused the injury are of the same grade, and as to all employees who do not come within either of the specified classes, the common-law rule still applies."[1]

Although there has been a number of cases on the statute in the lower courts, up to the present time only two cases, besides the one just referred to, have reached the Supreme Court. In Georgia Pacific Railway Company *v.* Brooks, 4 So. Rep. 289, the court held that a hammer used for driving spikes into cross-ties on a railroad was not "machinery" within the meaning of the act. In Georgia Pacific Railway Company *v.* Propst, 4 So. Rep. 711, the question as to who could claim the benefit of the statute came up. The court said: "Under the statute, the party claiming damages must be an employee at the time of the injury by

[1] Mobile & Birmingham R'y. Co. *v.* Holbron, 4 So. Rep. 146 (May, 1888).

contract, express or implied, binding on the defendant; and the injury must be received while rendering the service required by the particular employment or in obeying the order of a superior to which the employee is bound to conform. Injury received while doing other more hazardous service not pertaining to the employment, by way of accommodation, or self-assumed, is not sufficient. . . . The burden is on the plaintiff to prove a case within the provisions of the statute defining the liability of employers." Consequently, where a night watchman at a station, accustomed to ride upon defendant's trains to a neighboring station for his meals, was injured, while so riding, by complying with the conductor's request to assist in making a coupling, it was held that there was no such employment as brakeman as rendered the company liable for the injury.

In Massachusetts, after an agitation of the subject for several years, an Employers' Liability Act was passed in 1887, entitled "An Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by employees in their service." The provisions of the act are as follows:[1] —

"Where, after the passage of this act, personal injury is caused to an employee who is himself in the exercise of due care and diligence at the time —

(1.) By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; or

(2.) By reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence.

(3.) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine, or train upon a railroad, the employee, or in case the injury results in death the legal representatives of such employee, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee, nor in the service of the employer, nor engaged in its work."

This act, it will be noticed, resembles closely the provisions made in Alabama, and consequently in Great Britain. The Massachusetts law, however, goes farther than that of the other State

[1] Acts of 1887, chap. 270.

in enacting certain restrictions after the nature of the English act. For instance, compensation for personal injury shall not exceed four thousand dollars. For death, compensation shall not be less than five hundred dollars nor more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer or the person for whose negligence he is made liable. To maintain any action under the statute, notice of the time, place, and cause of the injury must be given to the employer within thirty days, and action begun within one year, from the date of the accident. An employer who has contributed to an insurance fund for the benefit of employees may prove in mitigation of damages the proportional benefit which the employee seeking to recover compensation has received from such contribution. If the employee knew of the defect or negligence, and failed to give notice thereof, he cannot recover. An employer is made liable to employees of a contractor or sub-contractor injured by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or furnished by him, and if such defect arose, or had not been discovered or remedied, through the negligence of the employer or of some person intrusted by him with the duty of seeing that they were in proper condition. If an employee is instantly killed, the widow, or next of kin, if dependent upon the wages of deceased for support, may recover as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered. Domestic servants and farm laborers do not come within the scope of the act.

In the Acts of 1888, chap. 155, it was provided that, if the incapacity of the person injured prevented the giving of the notice within the specified time, the said notice could be given within ten days after the incapacity was removed, or, in case of death, within thirty days after the appointment of the executor or administrator.

Numerous cases on this statute have been before the Superior Court; but as yet only one has been decided in the Supreme Court of the State.[1]

The facts were as follows: The defendant furnished a movable stage for the use of the plaintiff and a fellow-servant, each end

[1] Ashley *v.* Hart, October, 1888 (not yet reported).

being fastened to the house in which they were at work. The fellow-servant had charge of lowering one end and the plaintiff the other. The former neglected to fasten his end securely, whereby the plaintiff was injured. The declaration did not allege any defect in the condition of the stage itself. In sustaining a demurrer to this declaration, the court says, referring to the statute :—

" This so far changes the common law as to give a right of action to a servant who is injured by a defect in the machine, tool, or appliance itself, which is furnished for his use, although such a defect arose from the negligence of a fellow-servant whose duty it was to see that the machine, tool, or appliance was in proper condition. But it does not give a right of action against the employer for the negligence of a fellow-servant in handling or using a machine, tool, or appliance which is itself in a proper condition."

This case, curiously enough, the first on the subject, points out that the doctrine of common employment still exists in Massachusetts, as it does in Great Britain and in Alabama. The statute, as has been noted in the case of the English and Alabama acts, simply restricts and limits the application of that doctrine by exempting certain cases from its operation.

Both in Alabama and in Massachusetts the courts will undoubtedly be influenced by the decisions of the English courts. Unlike Alabama and Great Britain, however, Massachusetts has a law which will prevent private contracts from virtually repealing the statutory provisions. By P. S., chap. 74, §3, it is provided that —

" No person or corporation shall by a special contract with persons in his or its employ, exempt himself or itself from any liability which he or it might otherwise be under to such persons for injuries suffered by them in their employment and which result from the employer's own negligence or from the negligence of other persons in his or its employ."

As Massachusetts has long been regarded as the stronghold of the rule of non-liability of employers, holding that servants in command and even vice-principals are fellow-servants within the scope of the doctrine of common employment, the passage of an Employers' Liability Act, even if somewhat limited, will have considerable weight in other jurisdictions.[1] Indeed, it seems but a

[1] For a criticism of the Massachusetts doctrine, see Shearman and Redfield on Negligence, cited *supra*. A very recent case, Benson *v.* Goodwin, 17 N. E. Rep. 517, holding

question of time when the old harshness of the law in regard to employees will be done away with. The tendency of the American law is to interpret the doctrine of common employment more liberally in their favor. Great Britain and Massachusetts, jurisdictions in which their rights were much restricted, have modified the law to their advantage. In several of the Southern and Western States the doctrine has been abolished as to railroad employees,—a class in which injuries are of frequent occurrence. Below these surface indications is the trend of public opinion, not supporting capital at the expense of labor, nor labor at the expense of capital, but favoring a more equitable distribution of the responsibility which must fall upon the one or the other whenever labor is injured in the employ of capital.

In conclusion, it is interesting to note that the continental law already holds that position towards which our law is slowly drifting. In France, under the Civil Code,[1] an employer is held liable to one employee injured by the negligence of a co-employee. The law of Italy is the same.[2] In Germany, owners of railroads, mines, quarries, pits, or factories are made liable in certain cases for the negligence of employees.

Marland C. Hobbs.

BOSTON, MASS.

---

that the mate of a merchantman, and a common sailor under him, were fellow-servants within the rule, shows to what an extent the doctrine is still carried. See also Rogers *v.* Ludlow Manufacturing Co., 144 Mass. 198, 203.

[1] Article 1384.

[2] Italian Code, art. 1152.